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WILDCAT STRIKES IN HEALTH CARE INSTITUTIONS—*East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397 (7th Cir. 1983), cert. denied, 104 S. Ct. 1414 (1984).

In 1974, Congress added section 8(g)¹ to the National Labor Relations Act (NLRA), requiring labor organizations in health care institutions² to give ten days' notice before striking. In *East Chicago Rehabilitation Center, Inc. v. NLRB*,³ the Seventh Circuit Court of Appeals interpreted the ten day notice provision in the context of a wildcat strike⁴ by seventeen nurse's aides. A divided court held that the wildcat strikers were not required to give ten days' notice because they were not a "labor organization."⁵ The court further held that the strikers were protected even though theirs was a wildcat strike not authorized by their union.⁶

A wildcat strike in a health care institution illustrates the fundamental tensions existing in the policies behind the NLRA. A court must balance the Act's protection of employee concerted activity first against the public interest in uninterrupted health care and second against protection of the union as the exclusive bargaining agent of represented employees. As the *East Chicago* decision indicates, sometimes courts must make difficult choices between these conflicting interests.

This Note examines the *East Chicago* court's resolution of these conflicts. Neither precedent nor the court's own test for a "labor organization" support the court's holding on the ten day notice issue. The court's focus on whether the strikers constituted a "labor organization" is not a helpful way to analyze a wildcat strike in a health care institution. Furthermore, the court's holding that the strikers were protected even though they struck without their union's authorization is incorrect. Even under the minority approach, in which wildcat strikes may be protected activity, the court failed to consider all the proper factors in its analysis. This Note

1. Section 8(g) of the NLRA, 29 U.S.C. § 158(g) (1982), provides that a labor organization, before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall notify the institution in writing not less than ten days prior to the action.

2. The Act defines a "health care institution" as any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution caring for sick, aged, or infirm persons. 29 U.S.C. § 152(14) (1982).

3. 710 F.2d 397 (7th Cir. 1983), cert. denied, 104 S. Ct. 1414 (1984).

4. A wildcat strike is either a strike not authorized by the certified union, see, e.g., *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944), or a strike in breach of a no-strike clause in a collective bargaining agreement, see, e.g., *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int'l Union*, 452 F.2d 49 (7th Cir. 1971). This Note uses the term "wildcat strike" to refer to the former situation.

5. 710 F.2d at 404.

6. The Seventh Circuit affirmed a National Labor Relations Board (NLRB) order reinstating the dismissed strikers. *East Chicago Rehabilitation Center, Inc.*, 259 N.L.R.B. 996 (1982).

suggests an alternative approach to determine whether a wildcat strike in a health care institution is protected concerted activity under the NLRA.

I. LEGAL BACKGROUND

A. *The Ten Day Notice Provision of the 1974 Amendments*

When Congress passed the NLRA in 1935, it contained no exemption for hospitals; health care workers enjoyed the full protection of the Act.⁷ In 1947 Congress amended the Act,⁸ expressly exempting private non-profit hospitals. Congress again amended the Act in 1974, this time removing the exemption and inserting provisions specifically relating to health care institutions.⁹ In enacting the 1974 amendments, Congress recognized the competing interests at stake; health care workers should be protected as other workers are protected, but something more should be required of them in order to protect the public interest in continuous health care. One of the most significant additions of the 1974 amendments was section 8(g), which requires a labor organization¹⁰ in a health care institution¹¹ to give ten days' notice before striking.¹² Failure to give such notice is an unfair labor practice¹³ and leaves the strikers unprotected by the Act and therefore subject to discharge by the employer.¹⁴

7. Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, 450 (codified as amended at 29 U.S.C. § 152 (1982)).

8. Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 137 (codified as amended at 29 U.S.C. § 152 (1982)). The definition of "employer" in the Act, used between 1947 and 1974, excluded any corporation or association operating a hospital, if no part of the net earnings benefited any private shareholder or individual.

9. Act of 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. § 152 (1982)). In addition to the § 8(g) requirement, *see supra* note 1, the Act contains a definition of "health care institution," *see supra* note 2, and a requirement that when a health care institution is involved an employer or labor organization must provide 90 days' notice to the other party and 60 days' notice to the Federal Mediation and Conciliation Service if it intends to terminate or modify a present collective bargaining agreement. 29 U.S.C. § 158(d) (1982).

For articles dealing with the 1974 amendments in general, *see* Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235 (1975); Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, 1 AM. J. LAW & MED. 41 (1975); Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 NW. U.L. REV. 202 (1975).

10. Section 2(5) of the NLRA defines a labor organization as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5) (1982).

11. *See supra* note 2.

12. *See supra* note 1.

13. S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3949.

14. 29 U.S.C. § 158(d) (1982) states that any employee who strikes within the section 8(g) period loses his status as an employee of the employer for the purposes of §§ 158, 159, and 160 of the Title.

Courts recognize three exceptions to the ten day notice provision. First, a labor organization is not required to give ten days' notice or wait until the expiration of the ten day notice period when the employer has committed an unfair labor practice.¹⁵ Second, the notice provision does not apply if the health care institution is undermining the bargaining relationship.¹⁶ Third, the notice provision does not apply if the Board or the court finds that the strike does not involve a "labor organization" under section 8(g) of the Act.¹⁷ In all of the decisions in which a court of appeals has held the third exception to apply, the employees involved have not been represented by a union.¹⁸

15. S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 3946, 3949. The Senate Report cites *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), as an example of the type of unfair labor practice strike that would remove the ten day notice requirement. In *Mastro Plastics*, the record disclosed an attempt by the employers to coerce the employees into abandoning one union and joining another. *Id.* at 278. Employees whose strike is characterized as an unfair labor practice strike do not lose their protected status and are entitled to back pay and reinstatement even if their positions have been filled. *Id.*

For Board decisions relating to this exception, see *Cedarcrest Inc.*, 246 N.L.R.B. 870 (1979) (if institution qualifies as health care institution, then employer's actions constituted unfair labor practices similar to those in *Mastro Plastics*—employees not required to give § 8(g) notice); *Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Employees Union*, 232 N.L.R.B. 25 (1977) (no evidentiary support for the charge of unfair labor practices).

The employer in *East Chicago* may have committed an unfair labor practice by unilaterally changing a matter that was properly the subject of collective bargaining. Although no § 8(a)(5) charge was filed, 710 F.2d at 402, the employees might have prevailed on such an allegation under the reasoning of *NLRB v. Katz*, 369 U.S. 736 (1962) (employer's unilateral change in conditions of employment under negotiation is violation of § 8(a)(5), even absent finding of over-all subjective bad faith). The employees would have had to show that the unfair labor practice was as serious as that in *Mastro Plastics*.

16. S. REP. NO. 766, *supra* note 15, at 3950. See *District II99-E, Nat'l Union of Hosp. & Health Care Employees*, 229 N.L.R.B. 1010, 1011 (1977) (citing legislative history relating to both unfair labor practice exception and "undermining the bargaining relationship" exception; § 8(g) "was not intended to license deliberate and blatant frustration of the bargaining process").

17. *Montefiore Hosp. and Medical Center v. NLRB*, 621 F.2d 510 (2d Cir. 1980) (two unrepresented physicians not required to give notice); *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276 (9th Cir. 1979) (seventeen unrepresented counselors did not constitute a "labor organization"); *NLRB v. Rock Hill Convalescent Center*, 585 F.2d 700 (4th Cir. 1978) (three unrepresented employees not required to give notice); *Kapiolani Hosp. v. NLRB*, 581 F.2d 230 (9th Cir. 1978) (individual unrepresented employee not required to give notice); *Mount Carmel Hosp.*, 255 N.L.R.B. 833 (1981) (facility was unionized, but employee not in bargaining unit not required to give notice); *Walker Methodist Residence and Health Care Center, Inc.*, 227 N.L.R.B. 1630 (1977) (two unrepresented nurse's aides not required to give notice).

18. See *supra* note 17. The Board in its decisions, however, has not always required represented employees to give § 8(g) notice. See, e.g., *Villa Care, Inc.*, 249 N.L.R.B. 705 (1980) (union had been certified only four days before walkout and had not begun negotiating contract with employer).

B. *Wildcat Strikes and the NLRA*

A wildcat strike¹⁹ brings into conflict two sections of the NLRA: section 7,²⁰ which protects employees who bargain collectively and engage in other concerted activities for the purpose of collective bargaining,²¹ and section 9(a),²² which states that representatives chosen for the purpose of collective bargaining shall be the exclusive representatives of all the employees in that bargaining unit.²³ Because wildcat strikers are engaging in concerted activity without the authorization of their union, they appear from a literal examination of the statute to be both protected and unprotected: protected because of section 7 and unprotected because of section 9(a). The critical issue is whether the wildcat strikers should be protected to the same extent as strikers authorized by the union, or whether their activity is unprotected because of the exclusivity principle behind section 9(a).

Courts often do not agree on the relative weight of each section in the context of particular wildcat strikes, and have continually wrestled with the need to protect both the union's collective bargaining function and the interests of the wildcat strikers. The Supreme Court stated in *Emporium Capwell Co. v. Western Addition Community Organization*²⁴ that when wildcat strikers are bargaining separately, they will not be protected by the Act.²⁵ Most lower courts have applied *Emporium Capwell* broadly, holding that all wildcat strikes are unprotected activity. Thus, even when wildcat strikers have not attempted to bargain separately the majority rule is that the strike is unprotected activity.²⁶

19. See *supra* note 4.

20. 29 U.S.C. § 157 (1982).

21. See generally Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967).

22. 29 U.S.C. § 159(a) (1982).

23. The effect of § 9(a) and the exclusivity principle it embodies is ambiguous. While employers who deal with someone other than an elected representative are guilty of an unfair labor practice, see *infra* note 67, there is no similar section applicable to employees who bypass their elected representative. Thus, courts have defined this area of law by interpretations of the policies behind § 9(a) and § 7. For Supreme Court examinations of the policies behind § 9(a), see *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

24. 420 U.S. 50 (1975) (even when employees are attempting to eliminate racially discriminatory employment practices they must do so through the orderly collective bargaining process contemplated by NLRA).

25. *Id.* at 67-70.

26. R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 307 (1976). Gorman notes that the majority rule is supported by the philosophy of exclusive representation embodied in the NLRA. He points out the importance of having central control over bargaining and the use of economic force. The union's vital role is to adjust conflicts within the bargaining unit and then speak with a single voice to the employer. *Id.*

For cases illustrating the majority rule, see *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir.

Some courts recognize exceptions to this rule.²⁷ The most common exception is based on a factual determination of whether the wildcat strike has harmed the bargaining position of the elected representative. This “harm to the union” test, developed by the Fifth Circuit Court of Appeals in *NLRB v. R.C. Can Co.*,²⁸ recognizes protection of union bargaining power as the essential purpose of section 9(a).²⁹ If the court decides that the union has not been harmed, then there is no need to invoke section 9(a)’s exclusivity principle. For example, if the union later ratifies or condones the strike the court will likely find there has been no harm to the union. The goal of protecting concerted activity inherent in section 7 will therefore prevail and protect the wildcat strikers. On the other hand, if the union disavows the strike the court is less likely to find that the union has not been harmed, and will more likely invoke section 9(a).

1970) (area of protected wildcat activity is very narrow); *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969) (although employees were picketing against discriminatory hiring practices, and their goals were presumably supported by union, employees were deprived of protection of Act because they had obligation to go through union); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963) (inherent effect of wildcat strike is to undermine collective bargaining; purpose or intent of wildcat strikers is irrelevant); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) (wildcat strike is particularly harmful form of industrial strife; employees who struck because they thought company was “stalling” could be fired).

For articles dealing with the subject of wildcat strikes generally and their treatment by the Board and the courts, see Cantor, *Dissident Worker Action after “The Emporium,”* 29 *RUTGERS L. REV.* 35 (1975); Gould, *The Status of Unauthorized and “Wildcat” Strikes under the National Labor Relations Act*, 52 *CORNELL L.Q.* 672 (1967).

Professor Schatzki, in *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 *U. PA. L. REV.* 897 (1975), argues that the exclusivity principle itself should be reexamined because it may create more problems than it resolves. Unauthorized strikes, Schatzki argues, may actually be a “cathartic release” for employees who otherwise do not have an effective voice within the union. Making wildcat strikes unprotected may route the employee dissatisfaction into other channels, such as slowdowns and deliberate inefficiency, which may in fact be more disruptive than a wildcat strike. *Id.* at 916–17. See also Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 *OHIO ST. L.J.* 751, 752–54 (1973) (wildcat strikes, like other types of conflict, have positive as well as negative consequences). No court has adopted such a broad analysis.

27. See, e.g., *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976) (single employee’s leafletting complemented rather than circumvented established grievance procedure; employee’s purpose protected by § 7 of NLRA); *NLRB v. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976) (*Emporium Capwell* is not apposite because no evidence that strikers were at odds with or attempting to bypass their union); *NLRB v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964) (wildcat strike was protected activity because employer was not put in position of choosing between demands of union and those of strikers); *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963) (spontaneous strike that involved majority of employees and that was in support of union’s position was protected activity; union and wildcat strikers were demanding same thing); see also Note, *Availability of Section 7 Protection for Spontaneous Walkouts*, 39 *N.Y.U. L. REV.* 550 (1964).

28. 328 F.2d 974 (5th Cir. 1964).

29. See generally 18 *VAND. L. REV.* 222, 262 (1964).

II. THE COURT'S DECISION

East Chicago Rehabilitation Center (Center) was a nursing home whose employees had recently unionized and were in the process of negotiating an initial contract. During the contract negotiations, someone told the employer that the policy of letting employees leave the premises at lunchtime would make the employer liable for any injury an employee sustained during that time. The employer revoked the policy a few days later, informing employees they would have to remain on the premises during their lunch breaks.

After discovering the new policy at the beginning of their shift, the nurse's aides met twice with the management to protest the change, and then seventeen of them walked out.³⁰ About two hours later, after the employees had conferred with their union representatives, they agreed to come back to work. The center refused to reinstate them, firing them a few days later.³¹ The NLRB brought unfair labor practice proceedings against the Center for discharging the striking nurse's aides, alleging violations of section 8(a)(1) of the Act.³² The administrative law judge found that the Center had committed unfair labor practices and the Board agreed.³³

The Seventh Circuit Court of Appeals affirmed the Board's order. The court held that the strikers were not required to give ten days' notice of the strike as required by section 8(g) because the wildcat strikers did not constitute a "labor organization" within the meaning of the Act.³⁴ The court also found that the strike constituted protected concerted activity

30. *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397, 399 (7th Cir. 1983). These nurse's aides apparently walked out spontaneously, without any knowledge of the consequences. This is not explicitly stated in either the Board's or the Seventh Circuit's decision, but it seems likely that the wildcat strikers were not aware of their § 8(g) duty. After they walked out and one of the employees called the union, the union business agents told the strikers that it was not proper to leave the facility because there were federal laws that governed the matter. The union agents told the strikers that the union did not approve of the walkout and asked if they would be willing to return to work. The employees agreed. *Id.* at 400.

31. *Id.*

32. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with employees in the exercise of their rights guaranteed under the Act. 29 U.S.C. § 158(a)(1) (1982).

33. *East Chicago Rehabilitation Center, Inc.*, 259 N.L.R.B. 996, 1000 (1982), *aff'd*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984).

34. 710 F.2d at 403, 404. The court also considered and rejected the employer's claim that the strike was unprotected because it was activity that endangered life or destroyed property. The court said that "more must be shown than that the activity caused inconvenience." *Id.* at 404. The dissent strongly disagreed, quoting extensively from the record to rebut the majority's claim that the strike caused "mere inconvenience" rather than endangerment or acute distress of the patients. *Id.* at 409 (Coffey, J., dissenting). The dissent also differed with the majority's narrow interpretation of "labor organization," and argued that the striking nurse's aides constituted a "labor organization." *Id.* at 410.

under section 7 of the NLRA even though the walkout was a wildcat strike. The court reasoned that the exclusivity principle behind section 9(a) did not remove the wildcat strikers from the protection of section 7.³⁵

The *East Chicago* court held that the striking nurse's aides were not a labor organization, even though they were represented by a union.³⁶ The court held that wildcat strikers do not constitute a "labor organization" unless two requirements are met. First, the striking employees must have formed an "organization."³⁷ Second, the employees must have the "purpose" of bargaining with the employer.³⁸ If the court finds that the striking employees do not possess the "organization" or "purpose" necessary to constitute a labor organization, it will not require ten days' notice, even though the employees are represented by a union.³⁹ After the *East Chicago* decision, strikers in the Seventh Circuit are not required to give notice merely because they are represented by a union; the court will look to the circumstances of the strike to decide whether notice is required.

In addition to holding that the nurse's aides were not a labor organization, the *East Chicago* court addressed whether a wildcat strike was concerted activity protected under section 7, or whether the policies behind section 9(a) removed the strike from the protection of section 7. The court analyzed the wildcat issue with the "harm to the union" analysis of *R.C. Can.*⁴⁰ After first examining the facts of the case to find that the strikers were not engaged in separate bargaining,⁴¹ the court examined whether the strike had harmed the union. Because the court found that the wildcat strike did not impair the union's performance as exclusive bargaining representative, it held that the employees were protected.⁴²

35. *Id.* at 400 (majority opinion).

36. *Id.* at 403.

37. *Id.* at 404.

38. *Id.*

39. *Id.*

40. *Id.* at 400; *see supra* text accompanying notes 28–29.

41. 710 F.2d at 400. This is a necessary prerequisite to protection of any group of wildcat strikers. If the court characterizes the activity in a case as "separate bargaining," then the strikers are clearly brought under *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), and will not be protected. *See supra* note 24 and accompanying text.

42. The dissent argued that the majority's decision that the wildcat strike was protected activity "disregards an overwhelming weight of prior case law," 710 F.2d at 406 (Coffey, J., dissenting), and that the majority adopted a variant of a test which has been severely criticized. *Id.* at 414. The dissent noted that the test has been rejected by several circuits. The Supreme Court, however, has not ruled on the test. Logically, if a court decides to treat wildcat strikes as anything other than *per se* unprotected activity, it must adopt some type of test which looks to the circumstances to see if there has been harm.

III. ANALYSIS

In order to protect the strikers, the court construed the definition of "labor organization" so narrowly as to be inconsistent with both precedent and the policies of the NLRA. In addition, the court failed to consider the notice and wildcat issues together. The NLRA supports another exception to section 8(g) for wildcat strikers in addition to the three exceptions already recognized by the courts.⁴³ By acknowledging this fourth exception, the *East Chicago* court could have avoided the strained resolution of the notice issue and the incomplete analysis of the wildcat issue.

A. *The Court's Definition of a "Labor Organization"*

No previous Court of Appeals has considered whether wildcat strikers constitute a labor organization for purposes of applying section 8(g).⁴⁴ In its haste to protect the striking nurse's aides the court resolved the issue without considering whether the group was already represented by a union. The court also ignored the Supreme Court's mandate to apply the term "labor organization" broadly. The court's manipulation of the definition may have produced the desired outcome in this case, but the precedent established may cause problems for workers in the future.

The *East Chicago* court failed to distinguish between represented and unrepresented employees when it applied its "labor organization" test. The cases cited by the court to support the assertion that the aides were not a "labor organization," however, concerned strikes by unrepresented employees.⁴⁵ Although the employees in *East Chicago* were represented by a union,⁴⁶ the *East Chicago* court dismissed this fact and refused to distinguish the decisions from the present case.⁴⁷

43. See *supra* text accompanying notes 15-17.

44. See *supra* note 17; *infra* note 45.

45. The court cited *Montefiore Hosp. and Medical Center v. NLRB*, 621 F.2d 510, 514-15 (2d Cir. 1980) (two unrepresented doctors who joined picket line of lawful strike not obligated to give notice since they were not a "labor organization"); *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979) (seventeen unrepresented employees did not constitute a "labor organization"); *NLRB v. Rock Hill Convalescent Center*, 585 F.2d 700, 701 (4th Cir. 1978) (unrepresented employees not required to give notice under the act).

46. The union did not authorize and was not aware of the strike. The Board found that the union had no prior notice of the strike, 259 N.L.R.B. 996, 999 (1982), *aff'd*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984), although one of the strikers was a union steward. 710 F.2d at 404. The *East Chicago* court apparently found that this was not a "wink and a nod" strike, i.e., an attempt to get around the notice provision by striking without overt union authorization while having covert union support. 710 F.2d at 403.

47. 710 F.2d at 403.

The court should have given weight to this distinction. Unrepresented employees traditionally have been treated differently under the Act,⁴⁸ and should be treated differently under section 8(g) as well. The *East Chicago* wildcat strikers had a union through which they could have directed their protest, though they chose not to use it. Unrepresented employees, however, do not have the benefit of a collective bargaining framework in which to resolve disputes with their employer. Their unrepresented status makes it unlikely that any type of organizational structure exists. It would not make sense to require unrepresented workers to give formal notice when they possess no channels through which to give it.

Ironically, the *East Chicago* court's definition of a labor organization could have the effect of requiring unrepresented employees to give ten days' notice before striking. The court did not limit its "labor organization" test to represented employees.⁴⁹ It would therefore apparently apply its test of "purpose" and "organization" to an unrepresented group of employees as well. This would be inconsistent with precedent and policy under the NLRA. Unrepresented employees have historically been given greater protection under the Act,⁵⁰ and courts before *East Chicago* had not found that unrepresented employees could constitute a "labor organization" under section 8(g).⁵¹ Therefore, while the court found no "labor organization" in *East Chicago*, its reliance on the test may establish the analysis for other courts to find that unrepresented employees constitute a "labor organization."

As the dissent pointed out, another tradition under the Act is to define "labor organization" broadly;⁵² the ad hoc nature of a group is irrelevant.⁵³ The Supreme Court has stated, for example, that employee committees that exist at least in part for the purpose of dealing with employers concerning grievances constitute "labor organizations."⁵⁴ The Supreme Court explicitly rejected the requirement that a labor organization have the purpose of "bargaining collectively" with the employer. The Court

48. For example, courts have held unrepresented employees to be engaging in protected concerted activity even if a minority of employees is involved in the activity. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (unrepresented employees "had to speak for themselves as best they could"); *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1179-80 (8th Cir. 1982) (in deciding whether activity is protected, important to consider lack of representation of employees and absence of collective bargaining agreement); *First Nat'l Bank v. NLRB*, 413 F.2d 921, 926 (8th Cir. 1969) (strike by minority of employees protected activity where employees are unrepresented); see also *Getman*, *supra* note 21, at 1237.

49. 710 F.2d at 403. The court relied on § 8(g) cases which dealt with unrepresented employees.

50. See *supra* note 48.

51. See *supra* notes 17 and 45.

52. 710 F.2d at 410 (Coffey, J., dissenting). See *infra* note 60.

53. *Id.*

54. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) ("employee committee" constitutes "labor organization" under § 8(a)(2)); see also *infra* note 60 for other cases.

stated that Congress did not intend to limit the broad term "dealing with" to mean only the more limited term "bargaining with."⁵⁵ A labor organization can exist even without the attempt to negotiate a formal bargaining contract.⁵⁶

The *East Chicago* court defined "labor organization" too narrowly.⁵⁷ The Seventh Circuit applied the overly narrow "bargaining purpose" test, which the Supreme Court had rejected. The court held that the walk-out was a spontaneous expression by the nurse's aides and that they did not intend to bargain with the employer. The majority indicated that the strikers' only "purpose" was to "demonstrat[e] to the union the passions that had been aroused" by a new employee policy issued suddenly by the employer.⁵⁸ It is not credible for the court to insist that these employees walked out without any intention of influencing the employer regarding the new lunchtime policy.⁵⁹

The court's narrow definition of "labor organization" could have ramifications beyond the health care context. Usually, a broad definition of "labor organization" benefits employees.⁶⁰ The "labor organization" issue often arises in regard to section 8(a)(2) of the Act,⁶¹ where a broad definition of "labor organization" prevents employers from establishing company unions. Thus, while the court's narrow definition in this case protects the strikers, it could undermine the protections afforded to employees in other situations.

55. 360 U.S. at 212-13.

56. *Id.* at 213.

57. See *supra* notes 37-39 and accompanying text. The employees' conduct did resemble a § 2(a)(5) "labor organization." The workers at the Center received notice of the new employee policy at the beginning of their shift. Some of the employees first met with their supervisor and then went as a group to the office of the Center administrator to express their dissatisfaction with the change. After this meeting, some of the employees decided to punch out and leave the premises. 259 N.L.R.B. at 998.

58. 710 F.2d at 400-01.

59. The dissent concluded that the "purpose" of dealing with the employer and the "organization" did exist. The nurse's aides had the common purpose of protesting the new lunch policy. They collectively walked off the job, gathered as a group outside the facility and later acceded to the common decision to return to work. 710 F.2d at 410-11 (Coffey, J., dissenting).

60. See, e.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (employee committee was "labor organization" within meaning of Act; therefore, employer domination of committee was unfair labor practice); *NLRB v. Sweetwater Hosp. Assoc.*, 604 F.2d 454 (6th Cir. 1979) (association representing employees was "labor organization" even though by-laws did not include collective bargaining function); *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958) (employee committee, although loosely organized, was labor organization).

61. Section 8(a)(2) of the Act provides that it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. 29 U.S.C. § 158(a)(2) (1982).

B. *The Wildcat Issue*

1. *The Court's Labor Organization Test Confuses the Wildcat Issue*

The court's strained attempt to exclude the striking nurse's aides from the definition of "labor organization," combined with its application of the *R.C. Can* "harm to the union" test, unnecessarily muddies the already confused status of wildcat strikes. The analysis protects health care employees who strike without giving ten days' notice only if the union does not authorize the strike. The court noted that the striking employees also will not be protected if the union later condones the strike,⁶² yet in order for a wildcat strike to pass the *R.C. Can* "harm to the union" test the strikers' goals must be consistent with the union's goals. As a practical matter, courts will probably not find that a strike results in no harm to the union if the union refuses to ratify the strike after the fact.

The court's analysis creates an unjustified distinction between authorized and unauthorized strikers. It also poses practical problems for both the union and the strikers. Finally, the court's approach is self-contradictory because a finding that there was no labor organization under the court's definition should lead to a finding that the strike has harmed the union.

The Seventh Circuit's holding that the wildcat strikers did not constitute a labor organization and therefore did not have to give notice allows unionized employees to strike without giving ten days' notice as long as they ignore their union in doing so. This interpretation allows unauthorized strikers greater protection than authorized strikers. If the strike had been authorized by the union, the strikers would have been unprotected for failing to give notice. Even if the union had only condoned the walk-out after it occurred, the strikers would have been unprotected.⁶³ The protection of the strikers rests on the union's assurances that it neither authorized nor condoned the strike.

This creates a dilemma for unions. The *East Chicago* court's decision that wildcat strikers are not necessarily required to give ten days' notice encourages the union to tacitly authorize wildcat strikes because wildcat strikers are in a better position than authorized strikers. However, if the union actually encourages a strike without official affirmation in order to avoid the section 8(g) requirements,⁶⁴ the union puts the strikers in a

62. See *infra* note 63.

63. See 710 F.2d at 401. The majority found that the fact that the union told the workers to go back to work did not prove that the strike undermined the union's performance of its collective bargaining function. If the union had not repudiated the strike it might have been held to have ratified it, which would have made the strike unprotected and cost the strikers their jobs.

64. Both the majority and the dissent recognized this possibility. The majority conceded that "it

position to be fired if the court decides that there was tacit authorization.⁶⁵ Thus, to the extent that the decision encourages wildcat strikes it also makes it dangerous for the strikers if the union tacitly encourages them.

The union faces another dilemma because of the court's self-contradictory decision. First, because the wildcat strikers will be unprotected and the union guilty of an unfair labor practice under section 8(g) if the union later condones or ratifies the strike,⁶⁶ the union must convince the court that it did not approve of the strike even after it occurred. This may prove difficult. On the other hand, the union may want to protect its members against the exclusive bargaining mandate of section 9(a). To protect them under the "harm to the union" test, it must argue that the strike was in line with union goals. This argument, however, may conflict with its claim that it did not ratify or condone the strike.

The wildcat strikers also face a dilemma. In order to convince the court that they are not a "labor organization," they must argue that they had neither the necessary "organization" nor the "purpose." The need to show lack of "purpose" creates a potential problem. If the employees argue that the strike was in support of the union's goals so as to pass the "harm to the union" test, it is contradictory for them to also argue that they did not have the "purpose" required to qualify as a "labor organization." It would seem that the "purpose" requirement would be satisfied by a finding that the wildcat strikers were striking in support of the union's goals. Because of the balancing required to reach the right mix among all these assertions, the union and the wildcat strikers may take positions that have little relation to the actual course of events.

is difficult to distinguish between a truly unauthorized strike and a 'wink and a nod' strike encouraged by the union to evade the requirement of advance notice." 710 F.2d at 403. The majority was not influenced by this potential problem in its disposition of the notice issue, however, as it stated the Board found that there was "a mass of direct evidence that the union did not authorize the strike and tried to stop it as soon as it found out about it." *Id.* at 404. The dissenting judge, however, looked to the possible future effect of the *East Chicago* decision:

The majority's decision sanctioning wildcat strikes in the health care field will make it infinitely easier for unions to evade the 10-day advance notice requirement of section 8(g) by conducting so-called "wink and nod strikes"—a union could surreptitiously encourage a substantial number of its members to walk out, and then subsequently disavow any responsibility for the walkout.

Id. at 411 (Coffey, J., dissenting).

65. Even though the court held that the notice provision did not apply in *East Chicago*, the decision implies that it would have applied if there had been sufficient evidence of tacit authorization by the union. *Id.* at 404.

66. See *supra* note 63.

2. *The “Harm to the Union” Test Is Inadequate in the Health Care Context*

The *R.C. Can* “harm to the union” test, which the court applied, does not incorporate all of the relevant concerns in the health care context. The rationale for the test arises from the typical wildcat situation, in which harm to the union is the only significant result of unauthorized activity. When there is no demand for separate bargaining,⁶⁷ the employer has no more reason to object to an unauthorized strike than to an authorized strike. The employer will suffer the same consequences from both types of activity. Courts determining the harm caused by an unauthorized strike have therefore focused solely on the union.⁶⁸

In the health care context, however, the employer possesses a separate objection to an unauthorized strike. Because of section 8(g), an employer at a unionized health care facility expects to receive ten days’ notice of any strike. After the *East Chicago* decision, however, the employer may not receive notice if the strike is wildcat activity. By eliminating the notice requirement the court ignored a health care employer’s interest in avoiding an unexpected strike. By applying the narrow *R.C. Can* test which looks only to the interests of the union the court also ignored the interest of the public in uninterrupted health care. The court thus disregarded the important policy choices expressed by Congress when it adopted section 8(g).⁶⁹

The *East Chicago* court’s treatment of the wildcat issue also failed to reach a proper balance between the policies behind section 8(g) and other policies expressed in the Act. The balance between the exclusivity principle of section 9(a) and the general protection of concerted activity of section 7 is precarious even before section 8(g) is considered. Once the court adds the policies behind section 8(g) the balance tips against the striking employees. By deciding the notice and wildcat issues separately, the court avoided this critical problem. It did not need to consider the policies

67. If the unauthorized strikers do attempt to bargain separately and the employer accedes, the employer will have violated the Act. The NLRA carries the implication that bargaining with minority groups is an interference with the employee right to bargain collectively which is guaranteed by § 7. Such interference is a violation of § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), *see supra* note 32, and may also be a violation of § 8(a)(5), which states it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5). *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944) (employer violated sections 8(a)(1) and 8(a)(5) by negotiating about wages with employees unhappy with their union, and by refusing to bargain with the union).

68. *See Cantor, supra* note 26, at 61; *see also* Comment, *The Majority Participation Factor in Wildcat Strikes*, 30 WASH. & LEE L. REV. 683, 693 (1973).

69. The dissent asserted that the majority’s holding made “a mockery of Congress’ intent to strike a fair balance between the conflicting interests of employers and employees.” 710 F.2d at 406 (Coffey, J., dissenting).

behind section 8(g) in resolving the conflict between the other sections of the Act because it decided the wildcat issue first, without reference to the section 8(g) requirements.

IV. PROPOSAL

A. *Disregard the Notice Requirement of Section 8(g) in Wildcat Strikes*

The court could have avoided the difficulties outlined above by recognizing that the wildcat strike situation should be a fourth exception to the notice requirement of section 8(g). The history of the NLRA has been the protection of employee concerted activity.⁷⁰ Both section 7 and the unfair labor practice exception to section 8(g) show Congress's solicitude for the usually less powerful employee.

The legislative history can support this fourth exception to the section 8(g) notice requirement. Neither the 1974 amendments themselves nor the Senate report mentions wildcat activity, yet at the time the amendments were passed, the minority "harm to the union" test had been applied to protect wildcat activity.⁷¹ Including wildcat strikers within section 8(g) changes such wildcat strikes to per se unprotected activity without Congress explicitly mentioning them.

Moreover, applying section 8(g) to a wildcat strike requires a court to determine whether the strikers are a labor organization, yet it does not make sense to focus on the definition of a labor organization in the context of a wildcat strike. Inherently there is confusion, and often conflict, as to which "organization" is involved in a wildcat strike. Although there is a "labor organization" present—the union—it is not equitable to hold the union responsible for a section 8(g) violation which it did not support or encourage. Therefore, unless the union ratifies or condones the strike, the wildcat strikers are the only potential "labor organization" to which section 8(g) may apply.

Holding that the wildcat strikers constitute a labor organization, however, is also problematic. A court analyzing a wildcat strike in a situation in which section 8(g) notice is required must reach one of three results. First, the court can decide, as the *East Chicago* court did, that the wildcat strikers were not a "labor organization," and therefore did not have to give section 8(g) notice. Second, the court can decide that the strikers were a "labor organization" and are therefore unprotected because they did not give notice. Third, the court can find that the strikers were a "labor organization" but they fell under one of the exceptions to the ten

70. See *supra* note 48.

71. See *supra* note 27.

day notice provision.⁷² In the last two situations, the court would be saying that two “labor organizations” exist simultaneously, seemingly a clear violation of the exclusivity principle of section 9(a). Thus, although the court could decide that the strikers were not required to give notice under section 8(g), the strikers would be unprotected automatically because they violated section 9(a). Courts following *East Chicago* cannot find that a “labor organization” in a wildcat situation is protected, unless the “labor organization” gives ten days’ notice.

Finally, courts should not apply the ten day notice requirement to wildcat strikes because it would not serve the deterrence purpose of section 8(g). The nature of wildcat strikes means the strikers probably are acting without any knowledge of the consequences of their activity.⁷³ It is not realistic to believe that wildcat strikers would stop to give notice and then wait ten days to carry out their “spontaneous” strike. Section 8(g) will have little deterrent effect in the wildcat strike situation.

B. Apply a Modified “Harm” Test to Wildcat Strikes by Represented Health Care Employees

The *R.C. Can* “harm to the union” exception to the wildcat rule⁷⁴ is inappropriate for determining whether employees in the health care industry should be protected during wildcat strike activity. A better approach would be to apply a modified harm test which incorporates the concerns behind the 1974 amendments into the wildcat analysis. When the section 8(g) requirements are involved, harm to the union should not be the sole factor for deciding whether a wildcat strike should be protected. The employer and the public also have an interest in the continuity of patient care in health care institutions.

Excepting health care wildcat strikers from the section 8(g) notice requirement and applying a modified harm test restores the distinctions between unrepresented striking employees, unauthorized striking employees, and authorized striking employees. Unrepresented employees would continue to be per se protected under the third exception to the section 8(g) notice requirement because they would not be a “labor organization.” Wildcat strikers would be protected as far as giving notice, but would still have to pass a stiff “harm” test. Authorized strikers would be required to give notice under section 8(g). This would be consistent with the courts’ treatment of each of these groups; unrepresented employees are favored, wildcat strikers are disfavored but are not outlaws, and

72. See *supra* notes 15–17 and accompanying text.

73. See *supra* note 36 and accompanying text.

74. This test has been criticized. See *supra* note 42.

authorized strikers are presumed to have the guidance to know and understand the labor provisions applicable to them.

The proposed analysis has a significant advantage over the *East Chicago* court's analysis because a case such as *East Chicago* would be decided on a narrow ground. The proposed analysis requires no strained definition of a labor organization that may have implications beyond the health care context—it recognizes only a narrow exception to section 8(g) in the case of represented workers. Furthermore, the usual "harm to the union" test would be modified only if a health care institution were involved.

Admittedly, this new test establishes a difficult hurdle for wildcat strikers at health care institutions. Once the employer's interest and the public's interest are considered it is unlikely that a court would find that there was no harm. Under the modified test, the *East Chicago* employees probably would have been unprotected. The administrative law judge found that the lack of any notice before the *East Chicago* strike caused "substantial disruption in the normal operations of the facility and creat[ed] serious patient care problems."⁷⁵

When Congress enacted the 1974 amendments it intended a careful examination of strikes at health care institutions. It makes sense, therefore, to add the 1974 amendments into the section 7 and section 9(a) balance. When Congress added the 1974 amendments it indicated that striking health care employees have greater responsibilities than other workers under the NLRA. Applying this modified harm test to health care wildcat strikers would thus be consistent with congressional policy. The modified test would also allow more flexibility in applying section 8(g) because courts could excuse de minimis wildcat activity where no harm was done. For example, employees who left the premises for five minutes, or who had responsibilities which could not possibly affect continuity of patient care would not be summarily unprotected. At the same time, the modified test would further Congress's goal of protecting the public interest in uninterrupted health care because it would explicitly take the public interest into account in its resolution of a section 8(g) wildcat case. Such an approach would weigh the policies behind the NLRA rather than create legal rules which are often bent to achieve a just result.

75. 259 N.L.R.B. 996, 998 (1982), *aff'd*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984). The dissent quoted from the record, including the testimony of the center administrator, to indicate the employer's version of the consequences of the wildcat strike. 710 F.2d at 407-408 (Coffey, J., dissenting).

V. CONCLUSION

In *East Chicago* a court of appeals considered for the first time how a wildcat strike should be treated under the 1974 amendments to the National Labor Relations Act. The court decided that the strikers were not required to give ten days' notice of the strike under section 8(g) because they were not a "labor organization." It also held that their walkout was protected activity even though they struck without the authorization of their union.

The decision protects the striking employees in the present case, but creates numerous problems. First, the court's analysis of "labor organization" is inconsistent with both precedent and the reality of a wildcat strike situation. The court used the term too broadly when it included unrepresented employees within the ambit of the section 8(g) notice requirement, and too narrowly when it outlined the requirements as applied to these striking employees. In addition, the court resolved the "labor organization" issue without acknowledging that it creates separate problems in the context of a wildcat strike. Second, the court's resolution of the wildcat strike issue produced an anomalous result while relying on a rationale which is incomplete in the context of the section 8(g) notice requirement. Under the *East Chicago* decision, the strikers were protected only because they did not get union authorization before striking. The court decided they were protected because there had been no harm to the union—a position that ignores the additional concerns of the health care employer and the public in receiving the statutory notice.

The court could have avoided these problems by examining the notice and wildcat issues together. First, the wildcat strike is logically an exception to the ten day notice requirement. Second, the rationale of the harm to the union test is not applicable in the health care context unless the court considers the policies behind the section 8(g) requirements in conjunction with the traditional section 9(a) and section 7 balance.

A modified wildcat strike test would resolve the issues without producing confusing and inconsistent precedent in the definition of "labor organization." All of the parties would be better protected because the test would measure the harm to the employer and the public in addition to the harm to the union. Only by considering these complex issues in conjunction will the court reach the careful balance that Congress envisioned when it set out to protect striking employees, health care employers, and the patients who are often caught in the middle.

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